

NOT DESIGNATED FOR PUBLICATION
BRIAN S. MILLER, JUDGE

DIVISION II

CACR06-1247

June 6, 2007

ROLAND ESTER
APPELLANT

v.

STATE OF ARKANSAS
APPELLEE

AN APPEAL FROM THE PULASKI
COUNTY CIRCUIT COURT
[CR-00-1258, CR-06-63]

HONORABLE MARION ANDREW
HUMPHREY, JUDGE

AFFIRMED

After simultaneously conducting a bench trial and revocation hearing, the Pulaski County Circuit Court revoked appellant Roland Ester's probation in case number CR00-1258 and found Ester guilty of robbery and misdemeanor theft of property in case number CR06-63. The court sentenced Ester to concurrent eight year terms in the Arkansas Department of Correction. On appeal, Ester asserts that the trial court erred in revoking his probation and in failing to grant his motion to dismiss the robbery charge. We affirm on both issues.

On December 19, 2000, Ester pleaded guilty to one count of robbery, a Class B felony, and was placed on five-years' probation. When the State filed petitions to revoke Ester's

probation in July and August 2002, he agreed to be placed on probation for another five-year period beginning on October 23, 2002.

Ester was charged as a habitual offender on January 5, 2006, for committing robbery and theft of property at the O'Reilly's Auto Parts store, located at 5322 Asher Avenue in Little Rock. Both offenses, which were Class B felonies, were alleged to have occurred on November 26, 2005. The State later filed a petition to revoke Ester's probation. Ester waived his right to a jury trial, and the revocation hearing was held in conjunction with his bench trial on the robbery and theft charges.

Carroll Wright, the night manager at O'Reilly's, testified that Ester was seen in the store on November 26 with two bottles of tire cleaner in his coat. After one of Wright's coworkers told Ester to put the bottles back, Ester put one bottle back on the shelf and then walked to the door of the store. Ester then hit Wright in the chest and used his shoulder to attempt to push past Wright, who was standing in the doorway. A shoving match between Wright and Ester then ensued. When Wright's coworker stated that the police had been called, Ester again tried to shove past Wright, and the coworker grabbed Ester. Ester then attempted to hit the coworker and in the confusion was able to run out the door. The second bottle of tire cleaner fell from Ester's coat as he ran through the parking lot of the store.

Ester moved to dismiss the robbery charge at the conclusion of the State's case. The court, however, denied the motion. Ester then rested without putting on any evidence and

renewed his motion to dismiss. The trial court denied the motion, and the State then put on evidence as to Ester's status as a habitual offender.

The court found Ester guilty of robbery and misdemeanor theft and also found that Ester violated the terms of his probation. Judgment and commitment orders were entered on July 6, 2006, and from those orders, Ester now appeals.

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Ester argues that the trial court erred when it denied his motion to dismiss the robbery charge. A motion to dismiss is identical to a motion for a directed verdict in a jury trial and is a challenge to the sufficiency of the evidence. *Springs v. State*, 368 Ark. App. 256, ___ S.W.3d ___ (2006). When a defendant challenges the sufficiency of the evidence that led to a conviction, the evidence is viewed in the light most favorable to the State. *Russell v. State*, 367 Ark. App. 557, ___ S.W.3d ___ (2006). Only evidence supporting the verdict will be considered. *Graham v. State*, 365 Ark. 274, 146 S.W.3d 392 (2006). The test for determining the sufficiency of the evidence is whether the verdict is supported by substantial evidence, direct or circumstantial. *Id.* Evidence is substantial if it is of sufficient force and character to compel reasonable minds to reach a conclusion and pass beyond suspicion and conjecture. *Id.*

A person commits robbery if, "with the purpose of committing a felony or misdemeanor theft or resisting apprehension immediately after committing a felony or misdemeanor theft, the person employs or threatens to immediately employ physical force upon another person." Ark. Code Ann. § 5-12-102(a) (Repl. 2006). A theft occurs when a person knowingly takes

or exercises unauthorized control over the property of another person with the purpose of depriving the owner of the property. Ark. Code Ann. § 5-36-103(a)(1) (Repl. 2006). A criminal defendant's intent or state of mind is seldom capable of proof by direct evidence and must usually be inferred from the circumstances of the crime. *McElyea v. State*, 87 Ark. App. 103, 189 S.W.3d 67 (2004). Intent to commit a robbery may be inferred from the facts and circumstances of the case. *Jefferson v. State*, 359 Ark. 454, 198 S.W.3d 527 (2004).

Wright's testimony is substantial evidence supporting Ester's robbery conviction. Wright testified that Ester concealed two bottles of tire cleaner in his coat and that Ester employed force on Wright and a coworker in his effort to leave the store with the tire cleaner. Ester's argument that he returned the first bottle to the shelf and did not pick up the second bottle when it fell from under his coat is not persuasive.

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Ester's assertion that the State failed to show that he was made aware of the conditions of his probation is not preserved for appeal. This argument was not raised below and is a procedural objection which cannot be raised for the first time on appeal. *Whitener v. State*, 96 Ark. App. 354, ___ S.W.3d ___ (2006); *Nelson v. State*, 84 Ark. App. 373, 141 S.W.3d 900 (2004). For this reason, we affirm the probation revocation.

Affirmed.

GLADWIN and MARSHALL, JJ., agree.